Emporium Jaya (Bentong) Sdn Bhd v Emporium Jaya (Jerantut) Sdn Bhd (No 2)

HIGH COURT (TEMERLOH) — COMPANIES WINDING UP NO 28–4 OF 2001
RAMLY ALI J
12 MARCH 2002

Companies and Corporations — *Winding up — Notice of intention to appear — Whether application made at 'eleventh hour' could still be entertained by court before granting of winding up order — Companies Act 1965 s 221(2)*

Companies and Corporations — *Winding up — Petition under s 218 — Just and equitable rule — Whether applicants entitled to apply to court for oral evidence to be recorded and to cross-examine deponent affidavits in support — Whether applicants' application to cross-examine deponent made without just cause or motivated by desire to delay proceeding or without bona fide — Companies Act 1965 s 218*

Emporium Jaya (Bentong) Sdn Bhd ('the petitioner') presented a winding up petition against Emporium Jaya (Jerantut) Sdn Bhd ('the respondent') at the Temerloh High Court. The petition was signed by one Mr Koh Kheng Min, the liquidator of the petitioner. The petitioner prayed that the respondent company be wound up on the grounds that the respondent was unable to pay its debt (s 218(1)(e) of the Companies Act 1965 ('the Act')) and it was just and equitable that the respondent be wound up (s 218(1)(i) of the Act). These were applications by three applicants for leave of the court for oral evidence to be recorded on the petition and to cross-examine the liquidator of the petitioner on his affidavits in support of the petition. All the three applicants in the present applications, who at all material times, were suppliers of goods and merchandise to the respondent, had filed their respective civil actions in the Temerloh Session Court against the respondent after having discovered that the respondent company had been closed down and ceased business operation.

Held:

(1) Being interested parties to the present winding up proceeding, the applicants were entitled to know and to be satisfied that the petition filed by the petitioner was really supported by sufficient evidence. If the evidence by affidavit was insufficient to support the petition, then the applicants were entitled to apply to the court for oral evidence to be recorded and to cross-examine the deponent of the affidavits in support, in this case, the said Koh Kheng Min, the liquidator of the petitioner who has initiated the present winding up proceeding. Therefore the question of res judicata as raised did not hold water and was without merit (see p 683F–H).

(2) The applicants' applications to cross-examine the said Koh Kheng Min on his affidavit in support of the petition were not

made without just cause or motivated by a desire to delay the proceeding or without bona fide or sham or vexatious. There were bona fide reasonable grounds to support the applications. The said Koh Kheng Min needed to appear before the court to be cross-examined on his affidavits in order to assist the court to ascertain the truth and the validity of the allegations of debts as alleged in the petition (see pp 686H–687A); *Re Smith & Fawcett Ltd* [1942] 1 All ER 542 followed.

(3) The applications to call for oral evidence and to cross-examine the deponent of the affidavits were made under s 221(2) of the Act. The section provided that the power under the section could be invoked 'at any time' on the application of the petitioner, the company or any person who had given notice that he intended to appear on the hearing of the petition. Of course, the application must be made and the order could only be made by the court before winding up order was granted. So in the present case, even though the applications were made at the 'eleventh hour,' the court could still entertain them because they were made before the granting of the winding up order against the respondent company (see pp 687H–688A).

(4) Both ss 228 and 229 of the Act were not applicable to the present case. Both the sections were only applicable in winding up cases where a person other than the official receiver had been appointed as liquidator by the court. In other words, both the sections were only applicable after a liquidator had been appointed by the court, but not before. In the present case, all the applicants were creditors to the respondent company. They were not creditors to the petitioner company. Their interest in the proceeding only related to the respondent company. As far as the respondent company was concerned, winding up order had not yet been made by the court and no liquidator had been appointed. The said Koh Kheng Min, was only appointed as a provisional liquidator under s 231 of the Act. Therefore, the applicants in the present case could not, in law, invoke s 228 and s 229 of the Act in order to help them. Under the circumstances, the only proper and appropriate action to be taken by the applicants in the present case was to make the present applications under s 221(2) of the Act (see p 688D–H).

[Bahasa Malaysia summary

Emporium Jaya (Bentong) Sdn Bhd ('pempetisyen tersebut') telah mengemukakan satu petisyen penggulungan terhadap Emporium Jaya (Jerantut) Sdn Bhd ('responden') di Mahkamah Tinggi Temerloh. Petisyen tersebut telah ditandatangani oleh En Koh Kheng Min, penyelesai pempetisyen tersebut. Pempetisyen tersebut memohon agar syarikat responden digulungkan atas alasan bahawa respoden tidak mempu membayar hutangnya (s 218(1)(e) Akta Syarikat 1965

('Akta tersebut')) dan ia adalah adil dan saksama bahawa responden digulungkan (s 218(1)(i) Akta tersebut). Berikut adalah permohonan-permohonan oleh tiga pemohon untuk kebenaran mahkamah untuk keterangan lisan direkodkan atas petisyen dan untuk memeriksa balas penyelesai pempetisyen tersebut berdasarkan afidavit-afidavit beliau yang menyokong petisyen tersebut. Semua tiga pemohon dalam permohonan-permohonan sekarang ini, yang pada setiap masa matan, adalah pembekal barangan dan barang dagang kepada responden, telah memfailkan tindakan-tindakan sivil masing-masing di Mahkamah Sesyen Temerloh terhadap responden selepas mendapati bahawa syarikat responden telah ditutup dan telah berhenti operasi perniagaan.

Diputuskan:

(1) Sebagai pihak-pihak yang mempunyai kepentingan dalam prosiding penggulungan sekarang ini, pemohon-pemohon berhak untuk mengetahui dan berpuas hati bahawa petisyen yang difailkan oleh pempetisyen sememangnya disokong oleh keterangan yang mencukupi. Jika keterangan melalui afidavit tidak mencukupi untuk menyokong petisyen, maka pemohon-pemohon berhak memohon kepada mahkamah untuk keterangan lisan direkodkan dan untuk memeriksa balas deponen kepada afidavit-afidavit sokongan tersebut, dalam kes ini, yang bernama Koh Kheng Min, penyelesai pempetisyen tersebut yang telah memulakan prosiding penggulungan tersebut. Oleh itu persoalan res judicata sebagai mana yang ditimbulkan tidak mempunyai asas dan tanpa merit (lihat ms 683F–H).

(2) Permohonan pemohon-pemohon untuk memeriksa balas Koh Kheng Min tentang afidavit sokongan beliau kepada petisyen tidak dibuat tanpa sebab yang adil atau didorong oleh niat untuk melengahkan prosiding tersebut atau tanpa bona fide atau dalih atau menyusahkan. Wujud alasan-alasan bona fide yang munasabah untuk menyokong permohonan-permohonan tersebut. Koh Kheng Min perlu hadir di hadapan mahkamah untuk diperiksa balas tentang afidavit-afidavit beliau bagi membantu mahkamah memastikan kebenaran dan kesahihan dakwaan-dakwaan hutang sebagai mana yang didakwa dalam petisyen tersebut (lihat ms 686H–687A); *Re Smith & Fawcett Ltd* [1942] 1 All ER 542 diikut.

(3) Permohonan-permohonan untuk memanggil keterangan lisan dan untuk memeriksa balas deponen tentang afidavit-afidavit telah dibuat di bawah s 221(2) Akta tersebut. Seksyen tersebut memperuntukkan bahawa kuasa di bawah seksyen tersebut boleh digunakan 'pada bila-bila masa' atas permohonan pempetisyen tersebut, syarikat atau sesiapa yang telah memberikan notis bahawa beliau berhasrat untuk hadir di perbicaraan petisyen tersebut. Sememangnya, permohonan-permohonan tersebut

mesti dibuat dan perintah tersebut hanya boleh dibuat oleh mahkamah sebelum perintah penggulungan diberikan. Oleh itu dalam kes sekarang ini, walaupun permohonan-permohonan tersebut dibuat pada detik-detik terakhir, mahkamah masih boleh melayannya kerana ia dibuat sebelum perintah penggulungan diberikan terhadap syarikat responden (lihat ms 687H–688A).

(4) Kedua-dua ss 228 dan 229 Akta tersebut tidak terpakai dalam kes sekarang ini. Kedua-dua seksyen tersebut hanya terpakai dalam kes-kes penggulungan di mana seseorang selain daripada pegawai penerima telah dilantik sebagai penyelesai oleh mahkamah. Dalam erti kata lain, kedua-dua seksyen tersebut hanya terpakai selepas penyelesai dilantik oleh mahkamah, tetapi bukan sebelum. Dalam kes sekarang ini, semua pemohon adalah pemiutang-pemiutang kepada syarikat responden. Mereka bukan pemiutang-pemiutang kepada syarikat pempetisyen. Kepentingan mereka dalam prosiding ini hanya berkaitan dengan syarikat responden. Setakat syarikat responden adalah berkaitan, perintah penggulungan masih belum dibuat oleh mahkamah dan tiada penyelesai telah dilantik. Koh Kheng Min, hanya dilantik sebagai penyelesai mengikut peruntukan di bawah s 231 Akta tersebut. Oleh itu, pemohon-pemohon dalam kes sekarang ini tidak boleh, di bawah undang-undang, menggunakan ss 228 dan 229 Akta tersebut bagi tujuan membantu mereka. Dalam keadaan demikian, satu-satunya tindakan yang betul dan sesuai untuk diambil oleh pemohon-pemohon dalam kes sekarang ini adalah untuk membuat permohonan-permohonan sekarang ini di bawah ss 221(2) Akta tersebut (lihat ms 688D–H).]

Notes

For cases on notice of intention to appear, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 971–972.

For cases on winding up of a petition under s 218 of the Companies Act 1965, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1047–1062.

Cases referred to

Emporium Jaya (Bentong) Sdn Bhd (in liquidation) v Emporium Jaya (Jerantut) Sdn Bhd [2002] 1 MLJ 182 (refd)

Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd [1980] 1 MLJ 189 (refd)

Liew Yin Yin Construction Sdn Bhd v Yata Enterprise Sdn Bhd [1989] 3 MLJ 249 (refd)

Smith & Fawcett Ltd, Re [1942] 1 All ER 542 (folld)

Syarikat Telekom Malaysia v Business Chinese Directory Sdn Bhd [1996] 3 MLJ 692 (refd)

Tan Sooi Shin v Kow Kek Hing [1991] 3 MLJ 390 (refd)

A *Tay Bek Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 (refd)
Teck Yow Brothers Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd [1989] 1 MLJ 101 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor [1995] 3 MLJ 549 (refd)

B **Legislation referred to**

Companies Act 1965 ss 217(1)(b), 218(1)(e), (i), 221(1), (2)(c), (f), 222, 221(1), (2)(c), 223, 224, 228(b), 229(1), (2), 231, 236(3), (6), 237, 243, 277
Companies (Winding Up) Rules 1972 r 7(2), Form 1
C Rules of the High Court 1980 O 38 r 2(3)

KP Ng (*Ong Ban Chai & Co*) for the petitioner.
Mogan Karupiah (*Mogan Karupiah*) for the applicants.

Ramly Ali J: These are applications by three applicants vide encll 80, 83 and 86 for leave of the court for oral evidence to be recorded on the petition, D and to cross examine the liquidator of the petitioner on his affidavits in support of the petition.

Factual background

On 17 August 2001, Emporium Jaya (Bentong) Sdn Bhd (in liquidation) E ('the petitioner') presented a winding up petition against Emporium Jaya (Jerantut) Sdn Bhd ('the respondent') at Temerloh High Court, vide Companies (Winding Up) Petition No 28–4–2001. The said petition was signed by one Mr Koh Kheng Min, the liquidator of the petitioner. The petitioner prays that the respondent company be wound up on the grounds that the respondent was unable to pay its debt (s 218(1)(e) of the F Companies Act 1965 ('the Act')) and it is just and equitable that the respondent be wound up (s 218(1)(i) of the Act). The petitioner alleged that the respondent was indebted to the petitioner in the sum of RM18,133.68 being the 'unpaid balance on goods sold and delivered and unpaid balance on services rendered and advanced'.

G On 2 July 2001, all the three applicants in the present applications, who at all material times were suppliers of goods and merchandise to the respondent, had filed their respective civil actions in the Session Court Temerloh against the respondent after having discovered that the respondent company had been closed down and ceased business operations since May 2001. The applicants claimed that, as at 30 May 2001, the H respondent was indebted to them in the sums of:

(1) RM79,932.21 — to the first applicant, Then Shak Liong;
(2) RM40,705 — to the second applicant, Joo Huat Book Store Sdn Bhd;
(3) RM48,042.33 — to the third applicant, Joo Huat Stationery & Sport I Trading.

On 5 July 2001, each of the three applicants obtained an ex parte order of attachment before judgment against the property of the respondent. On

18 July 2001, the Temerloh Session Court's bailiff attached the movable properties and goods of the respondent company at Jerantut pursuant to the said order of attachment dated 5 July 2001. The court bailiff appointed public auctioneers and proceeded to proclaim the sale of the movable goods attached. The public auction was supposed to be held on 22 August 2001. On 17 August 2001, all the applicants obtained judgment in default of appearance against the respondent company in their respective civil actions against the respondent in Temerloh Session Court.

On the same day when the petition for winding up was presented against the respondent by the petitioner (17 August 2001) the petitioner has also filed an ex parte summons in chambers (encl 3) together with a certificate of urgency (encl 3) praying for the following orders:

(1) that Mr Koh Kheng Min of Messrs Koh & Associates, an approved liquidator, be appointed a provisional liquidator of the respondent company under s 231 of the Act;

(2) that the provisional liquidator is to take possession, control and protect the assets or realize the assets of the respondent company and such assets are not to be distributed or parted with until further order;

(3) that the petitioner is to give the usual undertaking as to damages which the court may make if the court was of the opinion that the respondent company shall have sustained;

(4) that the auction sale scheduled on 22 August 2001 or on such other date that may be fixed later against the assets of the respondent company be stayed pursuant to ss 223 and 224 of the Act, and that the costs of the intended auction's sale be paid by the provisional liquidator out of the respondent company's assets;

(5) that all further civil actions against the respondent company be stayed pursuant to s 222 of the Act pending the hearing of the winding up petition;

(6) that the costs of the application be taxed by the court and paid by the petitioner out of the assets of the respondent company; and

(7) such further relief or orders as the court deems fit.

The said summons in chambers were granted on 20 August 2001. The order was served on the court bailiff on 21 August 2001, and the public auction which was scheduled to be held on 22 August 2001 was cancelled.

All the applicants/judgment creditors being aggrieved and affected by the said ex parte order obtained by the petitioner then filed their respective applications to set aside the said ex parte order vide summons in chambers (encll 14, 18 and 22) on the ground that the said ex parte order was a nullity on procedural grounds and therefore cannot be sustained on merit. The applicant's applications were dismissed with costs by this court on 28 September 2001 (see *Emporium Jaya (Bentong) Sdn Bhd (in liquidation) v Emporium Jaya (Jerantut) Sdn Bhd* [2002] 1 MLJ 182).

A The ex parte order which was granted by this court on 20 August 2001 was to stay until the disposal of the winding up petition against the respondent.

On 31 October 2001, the petitioner filed a list of parties intending to attend the hearing of the petitioner. All parties were ordered to submit their B written submissions in respect of the petition and its objection. The petition was fixed for decision on 8 January 2002. In the meantime, on 3 January 2002, all the applicants filed their respective applications by way of summons in chambers for oral evidence to be taken on the petition as well as to cross examine the said Koh Kheng Min regarding his affidavits in support of the petition. On 8 January 2002, the petition was adjourned C pending hearing and determination of the applicants' applications.

These grounds of judgment are in respect of the said applications for leave of the court for oral evidence to be recorded on the petition and to cross examine the said Koh Kheng Min on his affidavits in support of the petition.

D

The applicants' applications

The three applicants filed their respective applications by way of summons in chambers vide encll 80, 83 and 86, praying, inter alia, for the following orders:

E (1) oral evidence be taken on the petition herein or on any matter relating thereto;

(2) Koh Kheng Min, the liquidator of Emporium Jaya (Bentong) Sdn Bhd (in liquidation), the petitioner herein, be directed to attend court to be cross examined on his affidavit dated 16 August 2001 (encl 4), F the petition herein dated 17 August 2001 and on his affidavit verifying petition dated 21 August 2001 (encl 11) and also on his affidavit in reply dated 12 September 2001 (encl 28) and on all or any other papers, reports or documents connected with or related to the proceedings;

G (3) such cross examination is to take place before the hearing of the petition herein on a date and time to be fixed by the court;

(4) the hearing of and/or the decision on the petition proper may be postponed and/or be stayed until after the final disposal of prayers (1), (2) and (3) above;

H (5) the said Koh Kheng Min, as such provisional liquidator, be directed to produce for inspection, by the applicant, his accountants or agents, all the books of account and papers of the respondent company in the hands of Koh Kheng Min, as the provisional liquidator herein, and the applicant, his accountant, or agent be at liberty to take photostat copies thereof;

I (6) Chong Ying Keong @ Chong Hock Yuen (NRIC No 440706-10-5373), Wong Weng Chau (NRIC No 390319-06-5145), Wong Lap Weng (NRIC No 660515-06-5449) and Pan Chew Chan (NRIC

No 520128-06-5161), the directors or former directors of the respondent company, may be summoned to appear before the court to give information and/or to produce books and papers relating to the respondent company in their custody concerning trade dealings, affairs or property of the respondent company; A

(7) Chin Sin Wa, a shareholder or former shareholder of the respondent company, and Chin Kim Wah, a shareholder or former shareholder of Emporium Jerantut (Kuala Lipis) Sdn Bhd, may be summoned to appear before the court to give information relating to the respondent company concerning trade dealings, affairs or property of the respondent company; B

(8) the said Chong Ying Keong @ Chong Hock Yuen, Wong Weng Chau, Wong Lap Weng and Pan Chew Chan, as such directors or former directors of the respondent company, and the said Chin Sin Wa and Chin Kim Wah, may be examined on oath by word of mouth concerning trade dealings, affairs or property of the respondent company by the court or the applicants; C

(9) all proceedings herein be stayed pending the final disposal of the applicants'/judgment creditors' application for leave to appeal to the Court of Appeal, and in the event such leave is granted, then all proceedings herein be stayed pending the final disposal of the said appeal; D

(10) alternatively, the judgment sums and all interest accrued thereon and costs in accordance with the default judgment dated 17 August 2001, be paid out by the said Koh Kheng Min to the applicant/judgment creditor herein from the assets and/or funds of the respondent company; E

(11) in the further alternative, all proceedings herein, including all proceedings to enforce and/or give effect to the winding up order that may be made herein, in the event the court shall be of the opinion that the respondent company ought to be wound up and also the distribution of all the moveable assets and/or the distribution of the proceeds of sale of the moveable properties of the respondent company herein, in the hands of the said Koh Kheng Min, as the provisional liquidator herein, be stayed until the final disposal of the applicants'/judgment creditors' appeal to the Court of Appeal; F G

(12) such further or other reliefs or directions as this honourable court deems fit; and

(13) costs of this application be paid by the provisional liquidator to the applicant from the funds at the respondent company. H

In my earlier decision in respect of the applicants' earlier applications to set aside the ex parte order granted in favour of the petitioner on 20 August 2001, where the said applications were dismissed with costs, I have ruled that all the applicants have got definite interests in the outcome or the decision of the court in this proceeding. They have interest on the subject matter of the winding up, and in my view, they have locus standi to oppose I

the petition as well as to apply to set aside the ex parte order obtained by the petitioner on 20 August 2001 (see *Emporium Jaya (Bentong) Sdn Bhd (in liquidation) v Emporium Jaya (Jerantut) Sdn Bhd*). It is not disputed that if the winding up petition against the respondent company is valid and successful, then the applicants' attempt to realize their respective debts from the respondent company would be hampered, and they would not have any priority in relation to the respondent's assets and properties. In *Teck Yow Brothers Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101, Abu Mansor J also held that an objector who had an interest in the subject matter of the winding up petition has locus standi in the proceeding.

In my earlier decision, I have also ruled that being the third party to the transactions, the applicants were not in the position to raise any bona fide dispute as to the alleged debts owed by the respondent company to the petitioner, as they have no knowledge about the transactions that led to the creation of the alleged debts. As such, I have ruled that the dispute raised by the applicants in the earlier applications to set aside the earlier ex parte order was not bona fide and not based on solid grounds. Such being the case, I have held that the petitioner qualifies to be 'creditor' for the purpose of s 217(1)(b) of the Act and has the necessary locus standi to petition for winding up of the respondent company. However, I would like to emphasize here that the above findings do not in any way affect the applicant's right to call for oral evidence and to cross examine the said Koh Kheng Min on his affidavits filed to support the petitioner, under the provisions of the law as applied under the present applications. To dispute the alleged debts and to call for oral evidence and to cross examine the deponent of the affidavits in support of the petitions are two totally different things. They are not the same. Eventhough the applicants would not be in the position to raise any effective dispute as to the transactions that led to the creation of the alleged debts, it does not necessarily mean that they are not entitled to request for oral evidence to be taken and to cross examine the deponent of the affidavit in support of the petitioner. Being interested parties to the present winding up proceeding, the applicants are entitled to know and to be satisfied that the petition filed by the petitioner is really supported by sufficient evidence. If the evidence by affidavit is insufficient to support the petition, then the applicants are entitled to apply to the court for oral evidence to be recorded and to cross examine the deponent of the affidavits in support, in this case, the said Koh Kheng Min, the liquidator of the petitioner who has initiated the present winding up proceedings. Therefor, the question of res judicata as raised by the petitioner's counsel in his submissions, does not hold water and is without merit.

The present applications are made under ss 221, 236, 237 of the Act and rr 7 and 55 of the Companies (winding up) Rules 1972 ('the Rules'), and also under the inherent powers of the court.

Under s 221(1) of the Act, the court may, on hearing a winding up petition, adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit. Section 221(2)(c) and (f) of the Act

empowers the court, on the petition coming on for hearing or at any time on the application of any person who has given notice that he intends to appear on the hearing of the petition, to direct that oral evidence to be taken on the petition or any matter relating thereto; and to give such other directions as to the proceedings as it thinks fit. Apart from these provisions, O 38 r 2(3) of the Rules of the High Court 1980 ('the RHC') enables the court to order attendance of the deponents of affidavits for their cross examination, on application of any party, and where after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the court. Under r 7(2) of the Companies (Winding Up) Rules 1972 ('the Rules'), every application in chambers shall be made by summons in Form 1, and the summons shall be served not less than two days before the day named in the summons, unless in any case it shall be otherwise ordered. The application may be made by any creditor and such application must be made by summons supported by an affidavit and the liquidator shall also be served.

In *Tay Bek Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, the Privy Council had pointed out that in winding up proceedings 'the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross examination of the deponent and that application has been granted and the deponent does not attend. The Privy Council, comprising Lord Bridge of Harwich, Lord Fraser of Tullybelton, Lord Templeman, Lord Griffiths and Lord Ackner, in reversing the decision of the Federal Court, further held at p 436:

> At the end of the day, the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondents' affidavit, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

This dictum has been followed in a number of decisions (see *Liew Yin Yin Construction Sdn Bhd v Yata Enterprise Sdn Bhd* [1989] 3 MLJ 249; *Syarikat Telekom Malaysia v Business Chinese Directory Sdn Bhd* [1996] 3 MLJ 692 and *Wee Choo Keong v MBf Holdings Bhd & Anor* [1995] 3 MLJ 549). Evidence by affidavits, just like oral testimony in court during trial, is admissible. If a person appears as a witness to give oral testimony in court, he is subject to be cross examined by the other party on what he says in examination in chief. The same principle should also apply to the deponent of an affidavit, ie he is subject to be cross examined on his depositions in the affidavit. In *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189, Salleh Abas FCJ (as he then was) at p 190 said:

> It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross examination unless the application to cross examine him is without just cause, vexatious or motivated by desire to delay the proceedings (*Allen v Allen* [1894] P 239).

However, it must be stressed here that to allow or not to allow any application to cross examine a deponent upon his affidavit is a matter of discretion based on judicial principles (see *Leisure & Allied Pte Ltd*). In another case, *Tan Sooi Shin v Kow Kek Hing* [1991] 3 MLJ 390, VC George J held at p 392:

> As regards the question of cross examination of witnesses and the adducing of oral evidence, this is not a writ action. It was a petition which was required to be supported by an affidavit or affidavits. Those opposing it may file affidavits in opposition and have them read at the hearing. Applications may be made to have oral testimony adduced and for cross examination of deponents of affidavits. Whether the court will allow such applications is entirely in the discretion of the court.

In order to enable me to exercise my judicial discretion as regards the present applications made by the applicants in the present case, it is necessary for me to see how the proposed cross examination would be relevant to the issue in the petition. An examination of this issue is therefore essential in order to enable me to determine whether the applications are made 'without just cause, or motivated by desire to delay proceedings or without bona fide or sham or vexatious.'

In the present case, the petition to wind up the respondent company was initiated by Mr Koh Kheng Min, the liquidator appointed on behalf of the petitioner. The petition was supported by the affidavits of the said Koh Kheng Min dated 16 August 2001 (encl 4); his affidavit verifying the petition dated 21 August 2001 (encl 11) and also his affidavit in reply dated 12 September 2001 (encl 28). The said Koh Kheng Min was also appointed provisional liquidator of the respondent company vide an order of this court made on 20 August 2001. In his affidavit in support of the petition, the said Koh Kheng Min alleged that while carrying out his job as liquidator of the petitioner, he discovered that the respondent company owed the petitioner in a sum of RM18,133.68 being 'unpaid balance on goods sold and delivered and unpaid balance on services rendered and advances'. To substantiate his allegation, he exhibited a copy of the balance sheet as at 30 November 2000 (but with the date deleted and changed to 31 May 2001 in pen) and two photostated pages of a purported general ledger. The proper audited statement of accounts of the respondent's company as well as other documents such as invoices or delivery notes which are commonly used in trade, have not been exhibited by the petitioner. The court must be satisfied and it is a duty of the petitioner to prove and establish the allegations of debts in the petition. The mere insolvency of the petitioner and the respondent company does not absolve the liquidator of the petitioner from his duty to satisfy the court by proper, valid, legal and admissible evidence and documents to prove and establish the allegations in the petition. In the circumstances, the original copy of the relevant statement of accounts, as well as the general ledger book, must be produced in court. In the present case, the respondent itself is not before the court. The respondent is not represented by any body right from the beginning of the petition. The liquidator of the petitioner is also the provisional liquidator of the respondent company. It is also not disputed that the

directors of the respondent company have absconded and could not be traced. The petitioner who is now in liquidation, was wound up on 10 August 2001 vide Companies Winding up No 28–3–2001 by Megah Supermarket and Departmental Store, and the said Koh Kheng Min was appointed liquidator of the petitioner. On 17 August 2001, the said Koh Kheng Min, as liquidator of the petitioner, filed separate petitions vide Companies Winding up No 28–4–2001, 28–5–2001 and 28–6–2001 to wind up the Jerantut, Raub and Kuala Lipis outlets of Emporium Jaya for allegedly owing RM18,133.68; RM2,281,618.31 and RM1,976,159.40 respectively to the petitioner. Emporium Jaya chains are actually sister companies run by the same people and controlled by one man. Reliable records show that one Mr Chong Hock Yuen @ Chong Ying Keong who has been a director at all material times of the said Megah Supermarket and Departmental Store Sdn Bhd (the petitioner in Winding Up case no 28–3–2001) was also the majority shareholder and has the controlling interest in all the other Emporium Jaya chains in Bentong, Jerantut, Raub and Kuala Lipis. The applicants have been dealing with the Emporium Jaya chains for about ten years and they have knowledge that all the Emporium Jaya chains were at all material times controlled and managed by one person, ie Mr Chong Ying Keong @ Chong Hock Yuen. The applicants have raised the issue of collusion between Megah Supermarket and Departmental Store Sdn Bhd and the petitioner and also that there may be impropriety by the director or directors of the petitioner. The applicants believed that there may be attempts to defraud the creditors, especially the unsecured creditors. This belief was further strengthened when all the four outlets of Emporium Jaya chains in Bentong, Jerantut, Raub and Kuala Lipis have closed business since May 2001 and a notice to that effect was advertised in a Chinese newspaper *(Nanyang Siang Pau)* on 17 May 2001. The petitioner also relied on a notice dated 31 July 2001 addressed to the board of directors of the respondent company about the alleged debts of RM18,133.68 owed by the respondent, being 'unpaid balance on goods sold and delivered and unpaid balance on services rendered and advances'. The notice was issued by the said Koh Kheng Min as liquidator of the petitioner. The notice also states that 'any discrepancy in this statement must be reported in writing within 10 days'. There is no indication to show that the said notice was sent to the respondent company. There is no proof of posting and proof of acknowledgement of receipt by the respondent company. Furthermore, as I have stated earlier, the respondent company as well as the petitioner and the said Megah Supermarket and Departmental Store Sdn Bhd, were at all material times controlled and managed by one person, ie Mr Chong Hock Yuen @ Chong Ying Keong. Under the circumstances, I am convinced that the applicants' applications to cross examine the said Koh Kheng Min on his affidavit in support of the petition were not made without just cause or motivated by a desire to delay the proceedings or without bona fide or was a sham or was vexatious. There are bona fide reasonable grounds to support the applications. The said Koh Kheng Min needed to appear before the court to be cross examined on his affidavits in order to assist the court to ascertain the truth and the validity

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of the allegations of debts as alleged in the petition. The respondent company was not before the court during the proceedings. It seems that they are not interested in contesting the petition. There may be some good reasons as to why the respondent or its directors chose not to object to the petition. The applicants have every reason to oppose the petition. In the circumstances, the applicants have done what is expected to be done, ie to apply for the deponent of the affidavit in support of the petition to be cross examined and to call for oral evidence to be taken. In this respect, I am in full agreement with Lord Green MR in *Re Smith & Fawcett Ltd* [1942] 1 All ER 542, when he said (at p 545):

> If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should, in my judgment, take the ordinary and obvious course of requiring the deponent to submit himself to cross examination.

In the present case, I am satisfied that it is only fair and proper for the said Koh Kheng Min to be cross examined on his affidavits in support of the petition in view of the fact that the applicants' solicitors had, on 21 December 2001 (before filing the present applications) sent a letter addressed to the petitioner's solicitor requesting for further and better particulars of the alleged debts in the said petition, but had received no response. The applicants' solicitors have also vide a letter dated 9 November 2001, sent to the office of the Official Receiver, Kuantan, Pahang seeking clarification on the matters and the conduct of the said liquidator, but have not received any response. For the sake of justice and also for the interests of all the other unsecured creditors, the court has no other alternative than to grant leave to the applicants to cross examine the said Koh Kheng Min on his affidavits in support of the petition.

Furthermore, the said Koh Kheng Min, was, at all material time, the liquidator for the petitioner and provisional liquidator for the respondent company. Being in that position, he is under the control and supervision of the court under ss 277 and 236(3) of the Act. Section 236(6) of the Act specifically provides that the exercise by the liquidator of the powers conferred on him shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

The petitioner's counsel argued that the applicants' applications were filed at the eleventh hour, ie after all the parties have submitted their written submissions on the hearing of the petition, and this urged the court to dismiss the applications. The counsel did not cite any authority to support this argument. I have considered the argument and found that it is without merit. The applications to call for oral evidence and to cross examine the deponent of the affidavits were made under s 221(2) of the Act. The said section provides that the power under the section can be invoked 'at any time' on the application of the petitioner, the company or any person who has given notice that he intends to appear on the hearing of the petition. Of course, the application must be made and the order can only be made by

the court before a winding up order is granted. So, in the present case, even though the applications were made at the 'eleventh hour', the court can still entertain them because they were made before the granting of the winding up order against the respondent company. A

The petitioner's counsel has also submitted that the applicants should have invoked s 229 of the Act before making the present applications to this court. The counsel submitted that the applicants should have gone to the official receiver for the purpose of making an enquiry in relation to the matter in question. The counsel argued that under s 229(1), the official receiver may make all the necessary enquiries relating to the conduct of a liquidator in performing his duties, if there is any complaint made by any creditor or contributory in regard thereto. The counsel further argued that if there is any necessity to examine the liquidator or any other person on oath relating to the winding up, the official receiver is the one who should make such an application to the court under s 229(2). The counsel also argued that under s 228(b) of the Act, the liquidator is bound to give the official receiver such information and such access to and facilities for inspecting the books and documents of the company, and generally such aid as may be requisite for enabling the official receiver to perform his duties. B C D

With respect, I am not able to agree with the counsel's submission relating to the application of ss 228(b) and 229 of the Act to the present case. I am of the view that both ss 228 and 229 are not applicable to the present case. Both the sections are only applicable in winding up cases where a person other than the official receiver has been appointed as liquidator by the court. In other words, both the sections are only applicable after the liquidator has been appointed by the court, but not before. In a winding up proceeding, the liquidator is appointed by the court at the time when a winding up order is granted against the company. Both the sections clearly say that they apply to cases 'where in the winding up of a company by the court, a person other than the official receiver is appointed liquidator'. They do not apply to cases where the provisional liquidator was appointed under s 231 of the Act. A provisional liquidator is appointed after the presentation of a winding up petition and before the making of a winding up order. E F G

In the present case, all the applicants are creditors to the respondent company. They are not creditors to the petitioner company. Their interest in the proceedings only relates to the respondent company. As far as the respondent company is concerned, the winding up order has not yet been made by the court and no liquidator has been appointed. The said Koh Kheng Min, was only appointed as a provisional liquidator under s 231 of the Act. Therefore, the applicants in the present case cannot, in law, invoke ss 228 and 229 in order to help them. Under the circumstances, the only proper and appropriate action to be taken by the applicants in the present case is to make the present applications under s 221(2) of the Act. In fact, in the present case, the solicitors for the applicants had, before filing the present applications in court, written to the petitioner's solicitor on 21 December 2001, requesting for further and better particulars of the alleged debts, but failed to get any response. The solicitors for the H I

applicants had also written to the office of the Official Assignee in Kuantan on 9 November 2001, seeking clarification on the matters and the conduct of the said liquidator, Koh Kheng Min. Again, the applicants failed to get any response from the official assignee. The petition was fixed to be heard in court on 8 January 2002. The applicants have filed in their notices of intention to oppose the petition. Therefore, the applicants have no other alternative but to make the present applications in court.

Decision

I have stated earlier that there are sufficient justifications to order the said Koh Kheng Min to be cross examined on his affidavits in support of the petition, and that oral evidence be taken from him on the petition and any matter relating thereto. Therefore, I am now making an order that prayers (1), (2), (3) and (5) as per the summons in chambers (encl 86) be granted. Prayer (4) is also necessary and is therefore granted, ie the hearing of and/or the decision on the petition proper is postponed and is stayed until after the final disposal of prayers (1), (2), (3) and (5).

With regard to prayers (6), (7) and (8), I am not prepared to grant them at this stage, because, as has been told in the affidavits that all the shareholders or former shareholders, as well as the directors or former directors of the respondent company have absconded and could not be traced. To compel them to give oral evidence in court may not be practical. The applicants may not be able to trace them and to serve the necessary order on them.

The process of tracing them may be time consuming. It may take years or may be they could not be traced at all. It would be unfair to the petitioner if the petition proper has to be postponed and stayed indefinitely until all of them can be traced and give oral evidence in court. It is also not in the interests of the applicants and other creditors to the proceedings. Therefore, I am not making any order in respect of prayers (6), (7) and (8).

Prayers (9), (10) and (11) are actually made 'in the alternative'. Again, I am not prepared to grant those prayers at this stage of the proceedings. What is necessary at the present stage is an order granting prayer (4), ie the hearing of and the decision on the petition proper be postponed and be stayed until after the final disposal of prayers (1), (2), (3) and (5). Section 221(1) of the Act enables the court, on hearing a winding up petition, to adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit. Furthermore, s 221(2)(f) of the Act also enables the court to give such directions as to the proceedings as it thinks fit.

I am of the opinion that prayers (9), (10) and (11) are not appropriate to be granted at this stage of the proceedings. Furthermore, the applicants' counsel has not submitted on the necessity of prayers (9), (10) and (11). Therefore, I am not making any order in respect of those three prayers at this stage of the proceedings. The applicants can still apply for appropriate orders under s 243 of the Act, at any appropriate time after an order for winding up has been made, and the court, on proof to its satisfaction, may

make any order staying the proceedings either altogether or for a limited time on such terms and conditions as it thinks fit.

Lastly, I am also making an order that costs of these applications be paid from the funds of the respondent company as prayed in prayer (13).

Order accordingly.

Reported by Peter Ling